

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

Westly Displays, Inc.  
Mike Popolow

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation  
Franchise Tax under Article 9A & 27 of the Tax Law :  
for the Years 1978 - 1980.

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 17th day of January, 1986, he served the within notice of Decision by certified mail upon Westly Displays, Inc., Mike Popolow the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Westly Displays, Inc.  
Mike Popolow  
589 Main St.  
Westbury, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
17th day of January, 1986.

David Parchuck

James O'Hanlon

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Westly Displays, Inc. :  
Mike Popolow :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A & 27 of the Tax :  
Law for the Years 1978 - 1980. :

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 17th day of January, 1986, he served the within notice of Decision by certified mail upon Murray M. Knight, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray M. Knight  
60 E. 42nd St.  
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
17th day of January, 1986.

*Daniel Parchuck*

*Annunzio DeStefano*  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

January 17, 1986

Westly Displays, Inc.  
Mike Popolow  
589 Main St.  
Westbury, NY

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Murray M. Knight  
60 E. 42nd St.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
WESTLY DISPLAYS, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on Business Corporations :	:	
under Articles 9-A and 27 of the Tax Law for the	:	
Years 1978, 1979 and 1980.	:	

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Petitioner, Westly Displays, Inc., 589 Main Street, Westbury, New York 11590, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Articles 9-A and 27 of the Tax Law for the years 1978, 1979 and 1980 (File No. 42084).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1985 at 2:45 P.M. Petitioner appeared by Murray M. Knight, CPA. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly asserted deficiencies against petitioner based on increments to its federal taxable income by the Internal Revenue Service, where the shareholders had resolved that any expenses disallowed to the corporation would be deemed additional salary or bonus income to them.

#### FINDINGS OF FACT

1. For the years 1978 through 1980, for federal corporation income tax purposes, petitioner, Westly Displays, Inc., was a small business corporation under subchapter S of the Internal Revenue Code. For New York State franchise

tax purposes, petitioner filed franchise tax reports remitting therewith the minimum tax of \$250.00.

2. Petitioner's sole officers are Meyer (Mike) Popolow and Harold Arowesty, each of whom owns 50 percent of the corporation's outstanding shares.

3. As the result of an examination conducted, the Internal Revenue Service disallowed certain travel and entertainment expenses incurred and deducted by petitioner during the years at issue. Denominated in the report as "field expenses," the disallowances totalled \$23,648.00, \$25,368.00 and \$17,392.00 for 1978, 1979 and 1980, respectively.

4. At a special meeting held on July 9, 1980, petitioner's shareholders adopted the following resolution:

"Should there be a disallowance of entertainment and/or travel or business expense incurred individually for the corporation by either Meyer Mike Popolow or Harold Arowesty, this disallowed expense would be deemed additional salary or bonus income to the officer who actually made the expenditure."

In accordance with their resolution, Messrs. Popolow and Arowesty submitted to the Audit Division reports of changes in federal taxable income (forms IT-115), advising the Division of the increments to their federal taxable income which arose from the disallowance of petitioner's expenses. Each shareholder reported one-half of the federal changes as "constructive dividends." Westly Displays, Inc. did not file with the Audit Division any report of the federal changes.

5. On November 5, 1982, the Audit Division issued to petitioner three notices of additional tax due, asserting franchise tax under Article 9-A of the Tax Law for 1978, 1979 and 1980 in the respective amounts of \$2,593.83, \$2,388.77 and \$1,440.25, plus accrued interest and penalty. The deficiencies were predicated on petitioner's failure to report the increases to its federal

taxable income and were calculated by applying the tax rate of 10 percent to such increases.

CONCLUSIONS OF LAW

A. That where the taxable income of a corporate taxpayer is changed or corrected by the Internal Revenue Service, Tax Law section 211.3 requires the taxpayer to report to the Audit Division such change or correction within ninety days after the final determination thereof. In the event the taxpayer fails to comply with this mandatory procedure, the Audit Division is authorized to assess a deficiency premised on the federal change by mailing to the taxpayer a notice of additional tax due (section 1081[e][1]). Petitioner does not dispute that it failed to advise the Audit Division of the Service's disallowance of certain expenses claimed. It follows that the Division was empowered to assert additional franchise tax upon the increments to petitioner's taxable income.


B. That it is immaterial that petitioner's shareholders reported to the Audit Division the changes to their income which flowed from the changes to petitioner's income. During the years under consideration, a small business corporation was subject to Article 9-A taxation, and increases to the corporation's income (due to disallowed deductions) would necessarily result in a double level of tax, at the corporate and at the shareholder levels. (See Tax Law section 209.8, added by the Laws of 1981, Chapter 103, section 26, effective for taxable years commencing on or after January 1, 1981.)

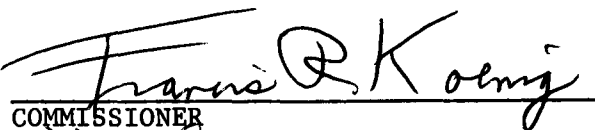
C. That the petition of Westly Displays, Inc. is denied, and the notices of additional tax due issued on November 5, 1982 are sustained in all respects.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER